No. 09-1208

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

v.

LAURENCE K. LIBBERTON,

Respondent.

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**ON PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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# BRIEF IN OPPOSITION TO PETITIONER'S WRIT OF CERTIORARI

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## CAPITAL CASE

There is no certiorari-worthy reason for this Court to review and second guess the well-reasoned, unanimous opinion below of the Ninth Circuit Court of Appeals. Respondent Laurence Libberton thus respectfully requests this Court deny the petition for writ of certiorari because the Court of Appeals correctly decided the capital sentencing ineffective counsel issues and its decision does not conflict with any decision of this Court or another Circuit Court. The lower court's decision finding counsel ineffective when he utterly failed to properly investigate and present readily available facts, evidence, records and witnesses at Libberton's capital sentencing proceedings rests on clearly established federal law, including the Antiterrorism and Effective Death Penalty Act. Its finding that the state postconviction judge's order denying relief on this claim was not a reasoned decision – a finding the district court made as well – was proper. *Libberton v. Ryan*, 583 F.3d 1147, 1166 (9th Cir. 2009).

In sum, the Petitioner has presented no sound reason to differentiate this case from the many capital cases where state officials merely disagree with the conclusion of a lower court, even though that conclusion is based on sound application of this Court's precedent.

## RESPONDENT'S STATEMENT OF THE CASE

Libberton adopts the underlying facts and procedural history detailed in the circuit court opinion below. App. A-1, pp. A-4-25.[1]

"Your Honor, at this point, candidly, I don't know." R.T. 6/24/82, p. 38.

George Lim, the appointed lawyer who represented Libberton in his 1982 capital trial, made that statement – not recently, and not to new defense counsel seeking an explanation years after the fact. Instead, Lim said this on the second day of Libberton's trial in response to the trial

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[1] App. _____ references are to the Petitioner's Appendix.

court's question, "What is the defense?" As bad as his trial performance was, Lim's assistance at sentencing was worse. Though appointed in December, 1981, Lim did *nothing* to prepare for Libberton's sentencing until *after* Libberton had been convicted of first degree murder.[2]

This case is about trial counsel's ineffectiveness when he failed to investigate and present available and important life-supporting evidence during Libberton's capital sentencing proceedings, and the prejudice Libberton suffered from his counsel's inaction. Counsel's efforts were few. Lim presented two witnesses whose connection to Libberton was "tenuous[]" at best: Nancy Henry, a neighborhood friend of Libberton's mother who had lived next to Libberton's family years before the crime, and had not seen Libberton in ten years; and Geraldine Smith, the mother of Libberton's former girlfriend. App. A-17, 43, 46. Neither knew Libberton well. *Id.* Henry testified that Libberton tried to please his father but was unsuccessful, and Libberton was not violent, but was "a follower." Smith testified that Libberton's father refused to pay Libberton for work he performed at his father's business, Libberton suffered a childhood fall from a vehicle, his stepmother beat him with a bat, and he suffered terrible headaches. Their testimony (including cross-examination) consumed less than fifteen transcript pages. R.T. 10/20/82, pp.12-16, 19-24, 26; App. A-17, 46-47.

Lim presented no other witnesses. He did not investigate or present evidence showing "James' primary responsibility for the crime" despite arguing that fact at Libberton's capital

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[2] Counsel's performance at Libberton's capital trial was equally wanting as noted above and as further supported by the fact that he interviewed none of the State's witnesses — not even the State's star witness, fourteen-year-old Martin Norton, a drug dealer and user, without whom the crime would not have occurred. App. A-45; Deposition of George S. Lim, pp. 232-234 , 244-246 (Nov. 3, 1992) ("Lim Depo."). Six months after his appointment, trial counsel hired an investigator, "but the investigator never interviewed anyone." App. A-45. Testimony and arguments consumed twelve courtroom hours; the jury returned its guilty verdict soon after closing arguments and instructions. R.T. 6/30/82, pp. 47-48.

sentencing hearing. App. A-44. Lim's inaction was even more startling given the statements contained in the presentence report from Libberton's only family member, his father. He told the presentence officer: "his son is a liar and a thief," he did "not doubt that the defendant actually committed the crime, and in fact, believes [Libberton] may have been the leader in the planning the crime." App. A-43. Lim did nothing to investigate or refute that "damning conclusion." *Id.*

Vital, powerful and available evidence not only contradicted those statements but supported a life sentence had Lim undertaken investigation. App. A-50-51. At the prosecutor's insistence, Lim attended the interview of State witness McIntosh, but asked no questions of McIntosh about Libberton or James. McIntosh had valuable evidence showing it was James who instigated the crime, and Libberton was only a follower. App.A-48, 50. Had Lim called him as a witness, McIntosh would have testified that the week before the crime occurred, "James borrowed [the] gun from a man who lived nearby" because "[h]e was upset his girlfriend moved out to live with two black men." App. A-51. "James carried the gun around in a brown bag," and "showed the gun to everyone and waved it at people." ER179; App. A-50. James showed McIntosh "photographs of gallows he had built," and told McIntosh "he had hung his dog from the gallows." App. A-50-51; ER180. McIntosh also would have testified that James was not only "physically big," but also "very violent." ER 180. After James' arrest, James called McIntosh and "threatened to kill" McIntosh and his family if "McIntosh testified against" James. App. A-51.

Other witnesses were available to testify about James' mental state and behavior on the day the victim was killed. Daniel Severance was with James on the day the victim was killed. App. A-49. Had Lim called him as a witness, Severance would have testified James was "very emotionally upset" and "extremely violent" that day because his girlfriend, Diane Hodge, "had

recently left him." App. A-49. Severance would have explained that James looked upon Norton "as a son" and "became very upset" in any setting where Norton was involved. *Id.* Severance also would have testified that based on his interactions with James, Severance "had no doubt" James "intended to do exactly what he said he would do": "kill" someone. Severance also would have testified he believed Libberton "was simply was in the wrong place at the wrong time." *Id.*

James' girlfriend, Diana Hodge, also had important testimony to provide. Hodge, who had lived with James up to the day of the crime, would have testified that she feared James' "excessive drug and alcohol use," and his "stealing." On the day the crime occurred, Hodge moved out of James' trailer because she "feared for [he]r life" based on "things that [] James said and did." App. A-50. Hodge stated James was "very intoxicated, "very high on drugs," "extremely upset," and as Hodge was leaving his trailer, James told Hodge that when he found her, he would "kill" her. *Id.* He later telephoned her and made the "same threat" again. *Id.* Hodge was "convinced [James] would have killed [her] or anyone else for revenge" because he was "in a horrible state of mind" and "deranged...." *Id.* Lim never interviewed Severance or Hodge. Had he done so, he would have uncovered these facts showing "James' greater culpability in" the victim's murder. App. A-54.

Lim also did not attempt to interview Norton before Libberton's capital trial or sentencing, investigate his background or review Norton's available juvenile records.[3] App. A-51-52. Had he reviewed Norton's records, he would have discovered key evidence "to impeach Norton." App. A-51. Those records, including "powerful psychological evidence," showed Norton "to be an unreliable witness," who had "a very difficult time perceiving any situation in a

[3] The court below did "not rely on Norton's affidavit" in reaching its decision, finding it "unlikely" that a diligent counsel "could have obtained such an affidavit, or such testimony, at the time of sentencing." App. A-51-52.

matter-of-fact way," and suffered a "very overpersonalized and … distorted perception of the environment which makes it difficult for him to maintain any stability." App. A.-44, 51. Norton also suffered "deep-rooted," "long-standing (sic) emotional problems," "chronic[] depress[ion]," drug abuse, and mental instability. Other records revealed:

> [Norton] will lapse into saying most anything that comes to his mind, or tell stories, in answer to a question, that are obviously not true. Also, he seems ... very much threatened [about] the subject of homosexuality....

App. A-52.

Norton demonstrated an "extremely high potential" for reacting in an "extremely impulsive, emotionally disorganized [] manner," and "erratic" manner. ER 200. "In stressful situations," Norton could "react with a far more disorganized and distorted" paranoia. ER 201. Norton suffered "significant and marked identity and psychosexual confusion" that Norton attempted to "deal with" "through overcompensation and projection." *Id.*

Despite his concern about Libberton's mental state, Lim did not call either psychiatrist Dr. Paul Bindelglas, or psychologist Dr. George Dee, who had evaluated Libberton and discovered a history of significant head injuries, to testify about their findings at Libberton's life-or-death sentencing.[4] App. A-17, 47-48. They found Libberton suffered "severe psychological" and "emotional problems," chronic depression and paranoia, poor contact with reality, impaired functioning, had a history of substance abuse and a character trait of acting impulsively in stressful circumstances. Both doctors concluded Libberton's actions at the time of the crime were not premeditated, but impulsive and consistent with his longstanding character trait of acting impulsively. App. A-48; ER 164, 169, 171, 172-176.

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[4] The trial judge received psychological reports from Drs. Bindelglas and Dee, and a presentence report prepared by the county probation office. App. A-17.

No reason supported Lim's failure to present the testimony of Drs. Bindelglas and Dee at Libberton's capital sentencing. ER 309-310. Lim understood that Dee had found Libberton suffered "organic cerebral deficit," "defective judgmental functioning," "poor reality contact," and "chronic depression," but "in [his] judgment," "they didn't" constitute mitigation. ER 319. Lim was "not sure" he understood the meaning of Dr. Bindelglas's finding that Libberton suffered from "organic cerebral deficit." *Id.*[5]

Lim did not properly investigate Libberton's background either. As a result, Lim did not discover the chaotic, cruel and violent childhood Libberton endured and about which Libberton's mother would have testified. Libberton's father "seriously abused" Libberton, "had a very hot temper" and "would fly into a rage" when angered. *Id.*, App. A-52-53. Libberton's father had been physically abused as a child, and now he "physically and emotionally abused" Libberton. ER 413; App. A-53. He beat Libberton "with a belt folded in half" that left "welts" on him. App. A-53. Following his parents' divorce, Libberton moved back and forth between his parents' homes and schools. ER 415. While Libberton was living with his father, the local child protective services agency called Libberton's mother to tell her that Libberton's father "had severely beaten" Libberton and his older brother, and "dropped them [off]" at the agency, "stating that he [no] longer wanted them." App. A-53; ER 407. CPS was so concerned about his safety, that they told his mother she should not return Libberton to his father's care. ER 407-08. Several days later when his mother saw Libberton, he still bore bruises from his father's beating. ER 408.

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[5] Lim testified he had no tactical reason for not presenting Dee's and Bindelglas's testimony at Libberton's capital sentencing. ER 309-10.

Had he investigated, Lim also would have discovered that when Libberton was young, his "dad favored him," and Libberton "thrived on this special treatment." ER 407. But as he "grew older," Libberton "'was beaten more' than the other children" by his father, and as a result, Libberton "was more affected" by his father's "erratic behavior and eventual rejection of him." App. A-53; ER 407.

Libberton's sister, Susan Farias, too, would have testified that she was "terribly afraid" of her father's "severe" "punishments" and his "erratic and inconsistent" "behavior." ER 413. She "never knew what to expect," and "[o]ften [she] would hide in the closet or outside under the lilac bush when [she] heard him near. Love and affection w[ere] impossible to obtain from [him]." ER 413. Susan also would have testified that Libberton "'was beaten more'" than she and her brother. App. A-53. Libberton's childhood friend, Helen Robichaux, confirmed Libberton's father had "'a very violent temper and was a difficult man to get along with.'" *Id.* She described the bruises Libberton bore when he came to school following his father's beatings. *Id.*; A-54.

A proper investigation also would have uncovered that Libberton's mother remarried, but her new husband, Gene Godby, had served a lengthy prison term for kidnapping and robbery in California, and not only used drugs regularly, but approved of and aided Libberton in doing the same. ER 416. Godby, too, beat Libberton. App. A-53.

Lim asked no questions of McIntosh about his long friendship with Libberton, or recent events involving co-defendant Steven James, without whom the crime would not have occurred.[6] Had Lim interviewed McIntosh, he could have presented critical testimony at Libberton's

[6] As noted above, Lim reluctantly attended the State's pre-trial deposition of McIntosh. Lim never interviewed McIntosh again.

sentencing. McIntosh had known Libberton since grade school. ER 178. He and Libberton began using drugs in 8th grade, and "used LSD and ... all types of drugs." *Id.* They sold drugs to support their habit." *Id.*

The court below found these available facts, and others, including James' "primary responsibility for the crime, and available witnesses who would have confirmed "James' violent nature and mental state on the day of the crime" constituted essential, relevant mitigation that Lim did not investigate. App. A-44-45, 52, citing, *inter alia*, *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) *overruled on other grounds* by *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (discussing the "kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability"); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *overruled on other grounds, Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (recognizing relevance of a defendant's background and character "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse." The court below also found, as did the district court, that the state court order denying Libberton's ineffective counsel claims based on these facts and evidence presented in the state postconviction proceedings was not a reasoned decision. Cert. Pet., p. 9; App. A-37. As such, it was not entitled to deference, or any presumption that it "was based on factually correct findings." App. A-37

The court found Lim's multiple errors in failing to properly investigate Libberton's background for mitigating evidence, interview available witnesses and obtain and review relevant records on Norton, the key witness against Libberton, constituted ineffective assistance of counsel. App. A-44-54. It then turned to whether Libberton had been prejudiced by counsel's reliance on two lay witnesses who had little connection or contact to Libberton. Petitioner agrees

these witnesses testified only that Libberton was a "follower rather than an instigator" and "had a difficult relationship with his father." Cert. Pet., p. 7. Petitioner also agrees that the only other evidence counsel "presented" to support a life sentence were "reports from two experts who examined him and who concluded that Libberton acted impulsively," and "'got carried away with what's happening at the time.'" *Id.*

The court below properly concluded that the "extensive evidence" counsel could have discovered had he conducted a reasonable investigation (addressed above) showed and corroborated "James' greater culpability" as the leader who instigated the crime. App.A-48. That evidence also demonstrated James "was extremely violent" the day of the crime, as discussed above, made multiple threats to kill his girlfriend, and following the crime, threatened to kill others. *Id.*, A-49-51.

Also, as discussed above, the court below identified "readily available evidence" Lim could have discovered from reviewing Norton's juvenile records. Those records "seriously undermined Norton's portrayal of Libberton as a coequal participant with James" in the murder. *Id.*, A-52. Based on these facts and clearly established federal law, the court below properly concluded sentencing counsel Lim "rendered unconstitutionally ineffective assistance" when he failed to conduct a reasonable investigation, and Libberton was prejudiced. *Id.*, A-54-55.

## Reasons Why The Writ Should Be Denied

### I. The Court Below Properly Applied Federal Law To The State Court's Unreasoned Decision.

Despite these facts and settled law, Petitioner's first question contends that the court below "mischaracteriz[ed]" "the state court ruling as unreasoned" and failed to defer to that ruling under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Cert. Pet., p. 13.

The court below recognized, as did the district court, that "the state court's order denying [Libberton's] IAC claims was unreasoned." App. A-37. That order "provided no citations to state or federal law," but "simply noted that 'defendant received nothing but effective assistance of three very experienced and qualified criminal attorneys.'" *Id.*[7] Given that Lim was Libberton's only counsel at his capital trial and sentencing proceedings, the court below was forced to "assume" the state court was referring to Libberton's "appellate counsel" as well. *Id.*

Petitioner's contention for seeking to impose reason on an unreasoned order is that—contrary to two federal courts' conclusion--the state post-conviction ruling is in fact "'reasoned,'" "entirely consistent" with *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), "addressed both prongs of the *Strickland* analysis" and found "additional evidence... would not have changed the sentencing decision." Cert. Pet., pp. 14-15. A simple reading of the state court order disproves that contention. App. E-1, 2.

Petitioner agrees a state court need not cite to this Court's authority, but it must ensure the state court ruling "is consistent with" "this Court's jurisprudence." Cert. Pet., p. 15. Here, it was not. In the state postconviction proceedings, Libberton identified his actions to promptly investigate and discover the underlying facts and evidence supporting his ineffective sentencing counsel claim. He "repeatedly asked the state court to grant an evidentiary hearing" to develop the facts, and "repeatedly asked the state court to provide funds to aid him in his investigation." App. A-35. The state court "consistently rejected" those requests. *Id.*

But that was not all Libberton did to discover and present the relevant facts supporting a life sentence. He filed sixteen exhibits supporting his ineffective counsel claims that he was able

[7] The district court agreed with the Ninth Circuit. App. B-109 ("PCR court's one-page summary dismissal of the 1987 PCR petition was not a 'reasoned decision.'").

to discover in the state court proceedings. Those exhibits included affidavits from two psychologists, a psychiatrist, potential witnesses, and Libberton's family. *Id.*; *State v. Libberton*, CR123711, Postconviction Petition, p. 65 (Ariz. Sup. Ct. Sept. 14, 1987). The State never refuted Libberton's facts in state court. It argued instead that the state court was not "obligated to be persuaded" by Libberton's "mitigation," but stated it did "not object to an evidentiary hearing." *State v. Libberton*, PCR Response, pp. 41-42 (Ariz. Sup. Ct. Dec. 21, 1987).

In his reply, Libberton repeated his request for a hearing "the substantive issues of fact and law" required because the State had not refuted them or "submitted any opposing affidavits." PCR Reply, pp. 1-2, 4, 9 (Ariz. Sup. Ct. Feb. 10, 1988). He also informed the judge that the "State asked the federal court to 'allow [Libberton] to return to state court so Libberton could exhaust his claims,'" effectively agreeing that any prejudice finding could be made only after a hearing. *Id.* But despite Libberton's diligence, the state court denied Libberton the funds and a hearing he needed and requested, and all relief, summarily concluding Libberton had been assisted by "qualified" counsel. App. A-37 These facts, and clearly established law, support the lower court's decision finding the state court ruling unreasoned, and conducting its independent review. *Id.*

The facts and law also disprove Petitioner's next contention that the state postconviction court addressed "both prongs of the *Strickland* analysis" in its summary ruling. Cert. Pet., p. 14. As explained above, the state court, without analysis or explanation of any kind, stated its "opinion that defendant received nothing but effective assistance of three very experienced and qualified attorneys." App. E-2. Given the utter lack of preparation or performance by Lim, that ruling was unreasoned. App. A-37. It did not "proper[ly] appl[y]" the *Strickland* analysis, and Petitioner provides no facts to support that contention. Cert. Pet, p. 15. Libberton agrees that a

state court need not cite to this Court's authority, but as even Petitioner concedes, a state court's ruling at the very least must be "consistent with this Court's jurisprudence." Cert. Pet., p. 15. Here, it was not.

The state court ruling ignored the evidence Libberton presented demonstrating his counsel's stark and repeated omissions in failing to conduct a reasonable investigation into the facts of the crime, Libberton's life history and background. Lim did not "pursue evidence of James' primary responsibility for the crime" and "driving force behind the murder," or his "violent nature and mental state on the day of the crime." App. A-44. Lim did not "investigate Norton's background" or available, "powerful psychological evidence showing Norton" "an unreliable witness." *Id.* Lim did not "attempt to impeach [Libberton's] father's" "damning" statements about his son, App. A-43.[8] Comparing Lim's actions to that of counsel in *Rompilla v. Beard*, 545 U.S. 374, 381 (2005), the court below noted this Court has "found deficient performance" where counsel did "far more than Lim did" here. *Id.*, App. A-44.

Here, unlike *Rompilla*'s counsel, Lim spent even less time preparing for Libberton's capital sentencing. The only two witnesses he presented knew little about Libberton, his background or his family, and nothing about the crime or Libberton's role in it. *Id.*, App. A-45. Equally inexplicable, "Lim obtained funds to hire an investigator, but the investigator never interviewed anyone." *Id.* Lim agreed it "might have helped to interview a couple of the witnesses," and admitted he never interviewed Norton or "talked to" anyone to find "background

[8] Petitioner erroneously contends that court below did not apply AEDPA's "deferential standard of review." Cert. Pet., p. 14. It did. In doing so, the court explained that standard is "somewhat different" when, as here, it must analyze a state court's unreasoned decision. *Id.*, App. A-25-26, 29. In those circumstances, the court "independently review[s] the record to determine whether the state court clearly erred" in applying Supreme Court law. However, it "still defer[s] to the state court's ultimate decision." App. A-26.

information" about him, including "whether he was a truthful person." *Id.* The lower court's finding that Lim provided ineffective assistance when he failed to investigate readily available evidence supporting a life sentence is supported by both the facts and the applicable law. *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Wiggins*, 539 U.S. at 521, 526, 527-28 (2003); *Rompilla*, 545 U.S. at 391-92.

## II. THE COURT BELOW PROPERLY APPLIED FEDERAL LAW IN FINDING COUNSEL'S MULTIPLE OMISSIONS PREJUDICED LIBBERTON.

Petitioner's second question rests on an erroneous premise: that the court below failed to "Properly Defer to the State Court's Analysis of Libberton's Post-Conviction Claim." Cert. Pet., p. 18. It contends the court below "myopically focuse[d]" on whether additional available mitigating evidence could have been presented if Lim had properly investigated, rather than "the reasonableness" of the state court ruling denying Libberton's ineffective counsel claim. *Id.* The record and the facts show otherwise.

First, as discussed above, and as two federal courts found, there was no state court "analysis" to review or to which to apply deference: the state court ruling was unreasoned. The court below addressed the postconviction petition Libberton filed in the state court that was supported by sixteen exhibits, multiple affidavits, a request for funds to pursue needed discovery and a hearing, and the reasonableness of the state court's summary "ruling" denying it. App. A-19-20, 35. It found, as did the district court, the state court order contained no "analysis" of Libberton's claims and evidence, much less one that required deference.

Petitioner's next contention is that some of the evidence counsel could have discovered had he investigated, that Libberton was a "follower" and had a "difficult relationship with this father" was presented. Cert. Pet., p. 19. Libberton has never contended otherwise, and the court

below addressed that paltry evidence: two witnesses "both of whom were only tenuously connected to Libberton. One had not seen Libberton in ten years"; the other "the mother of an ex-girlfriend." App. A-43. The only other "evidence" Lim presented was "two psychological reports" from Drs. Dee and Bindelglas, and a presentence report prepared by the state probation office that contained his father's "damning" statements that Libberton was "a liar and a thief," and his belief that his son committed the crime and "may have been the leader in planning" it. *Id.*; A-17, 47-48.

But as the court below explained, the evidence discussed above that Lim could have and should have discovered had he conducted even a minimally competent investigation was powerful and "transformed the case for mitigation" *Id.*, A-48. Petitioner attempts to defuse the critical importance of this evidence by describing it as only more evidence that Libberton was a "follower" and "easily influenced...." Cert. Pet., p. 20-21. It was far more. App. A-48-54. As the court below described, although Lim argued at Libberton's sentencing that Libberton was only a follower, the only evidence that supported it was one of the two witnesses who testified at sentencing, and knew little about Libberton. App. A-49. Worse, Libberton's own father's statements to the presentence report writer "directly contradicted" that testimony when he stated Libberton "may have been a leader in planning the crime." *Id.* Had Lim investigated, he could have presented the testimony of Daniel Severance, Diana Hodge, Daniel McIntosh, and "readily available" juvenile records of key witness Norton that showed Norton an astoundingly incredible and unreliable witness, as discussed above. He also could have presented the detailed testimony of Libberton's family and friends who explained, among other things, the trauma and repeated abuse he endured as a child, and his father's terrible beatings and ultimate rejection of him.

As discussed above, the state postconviction court denied Libberton relief on these facts

and claim, but provided no rationale for doing so. App. A-21. Petitioner's attempt to provide a rationale by quoting the state court's unreasoned one-sentence ruling fails. Cert. Pet., p. 21. Petitioner next relies on the district court's ruling denying relief after concluding that the murder was "planned" over several hours, was cruel and motivated by pecuniary gain, and family testimony of "essentially character evidence similar to testimony presented" at the brief sentencing would not have changed the result. *Id.*, p. 22. The district court's characterization of the family testimony is constrained and flawed. That court's decision rests on the premise that the additional evidence Libberton presented below "was similar to testimony" at sentencing from the two witnesses who barely knew Libberton. *Id.* As discussed above, it was not; it was substantially less in scope and weight. Libberton gathered and presented far more evidence supporting life that Lim could have presented had he conducted even a minimally competent investigation. In addition to key evidence about Libberton's childhood, abusive father, drug-addicted step-father and more, Libberton also presented key evidence about James, who both Libberton and Norton feared (as did McIntosh, James' girlfriend and others), and without whom the crime would not have occurred. App. A-49-52. That evidence "dramatically transformed the case for mitigation," and had it been presented, a "reasonable probability" of a different sentence exists. App. A-48.

Petitioner's reliance on *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007), for the proposition that the panel was required to defer "to the state post-conviction factual determinations" because the postconviction judge was the same judge who sentenced Libberton, is misplaced. Cert. Pet., p. 23. Here, unlike *Schriro*,[9] the state court order was unreasoned.

[9] *Schriro* addressed state court fact-finding made when "a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." *Id.*, 550 U.S. at 478. There "Landrigan

App. A-20; App. E-2. Without explanation of any kind, the state judge simply stated: "nothing defendant has raised in his current petition for post-conviction relief would have affected the outcome of the trial or sentencing." That conclusory assertion, unsupported by any discussion or record citation, is not fact-finding subject to deference; it is a decision but one without factual support or rationale. App. A-37.

Petitioner's complaint that the Ninth Circuit in other cases not at issue here has failed to apply appropriate deference to state court fact determinations has no bearing in this case and is misplaced in any event. Cert. Pet., p. 23. The case on which it relies for that proposition, *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010), is easily distinguishable. There, unlike here, the postconviction court held a hearing where testimony and evidence was presented, and following that hearing issued an opinion containing both facts and reasoning. *Id.*, p. 1095-99. Cert. Pet., p. 24.

Equally meritless is Petitioner's contention that the Ninth Circuit improperly relied on the McIntosh affidavit. Cert. Pet, p. 24. It did not. Libberton was "remarkably successful in finding and presenting evidence to the state court." App. A-36. As discussed above, he repeatedly sought a hearing from the state court (which Petitioner did not oppose), and supported that request with documents and evidence he discovered, and motions requesting needed discovery and funds. *Id.*; App. A-35. Petitioner's contention that Libberton "never proffered an explanation for why he could not have presented" the McIntosh affidavit to the state court is mistaken as well. Cert. Pet., p. 24. Libberton attempted to obtain leave to depose McIntosh in

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informed his counsel not to present any mitigating evidence," and when asked by the court if he had issued that instruction, "Landrigan responded affirmatively." *Id.* at 476. Later "when asked if there was any relevant mitigating evidence, Landrigan answered, "Not as far as I'm concerned." *Id.* On those facts, this Court found the state factfinding reasonable. No such instructions were issues here.

early 1987 in the district court before he filed his 1987 post-conviction petition because, as Libberton explained, McIntosh "intends to leave ..Arizona within the next few weeks...." Libberton requested an accelerated hearing on his motion, but Petitioner opposed it. *State v. Libberton*, 85 CR 44, p. 2; CR 45. When Libberton filed his 1987 state postconviction petition, he attached an investigator's affidavit detailing his interview with McIntosh. The court below properly found Libberton exercised diligence in obtaining this evidence. App. A-35-36.

Petitioner's next contention that the McIntosh affidavit was "essentially cumulative" to evidence the state court found "wanting" is erroneous and baseless. Cert. Pet., p. 24. The state court decision was unreasoned. It is not known what consideration, if any, the state court gave Libberton's evidence. All that is known is that Libberton presented evidence he was able to discover without aid of any kind from the state court and the state court summarily refused him "the opportunity to develop more evidence and rejected his claims on the merits." App. A-35. The additional evidence corroborating James' role as the leader in the crime is both highly relevant and material to Libberton's sentence.

Petitioner's next contention that the new evidence concerning "James' character and his propensity to violence" is of "marginal relevance" is also erroneous. Cert. Pet., p. 25. That evidence not only corroborated James role as the leader, and Libberton's role as a follower, but it also provided an explanation for why Libberton was unable to extricate himself from the events of that night.

Respondents' reliance on *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), also is misplaced. Cert. Pet., p. 25. There, unlike here, counsel investigated his client's childhood, family history and background, and interviewed multiple lay witnesses:

> [Counsel] contacted their lay witnesses early and often: They spoke nine times with his mother (beginning within a week after the indictment), once with both parents together, twice with an aunt who lived with the family and often cared for Van Hook as a child, and three times with a family friend whom Van Hook visited immediately after the crime.

130 S. Ct. at 18.

In sum, the evidence Libberton was able to discover despite the lack of funds and a hearing was *not* cumulative to the minimal evidence Lim presented: two witnesses, neither of whom knew Libberton or his family well. The totality of this evidence--which was not investigated and thus not presented by Libberton's ineffective trial counsel—fully supports the Ninth Circuit's conclusion that Libberton was prejudiced by the absence of this evidence in his sentencing calculus.

## III. THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S PREJUDICE JURISPRUDENCE.

Respondents' final contention is that the court below "rewrote" the "prejudice prong," and failed to consider relevant facts and law in reaching its decision. Cert. Pet, pp. 25-26. It did not.

Respondents concede the Court "recognized" the proper prejudice inquiry required it to reweigh the aggravating and mitigating evidence. *Id.*, p. 26. It contends, however, that the court did not apply that analysis, but instead "examin[ed] the mitigating evidence" and "merely found" trial counsel's complete and utter failure to conduct a thorough investigation "to find and present" available relevant mitigating evidence prejudiced Libberton, and that but for counsel's actions, a reasonable probability of a different result exists. *Id.* The careful discussion and review the Ninth Circuit panel employed belies that assertion. The analysis the court below applied is the very one applicable to analyzing whether counsel rendered competent

representation here. App. A-39-45. The court cited and applied the principles set forth in *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"), *Williams*, 529 U.S. at 396 (counsel had an "obligation to conduct a thorough investigation of the defendant's background"), *Wiggins*, 539 U.S. at 535 (2003) ("Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability"); and *Rompilla*, 545 U.S. at 381. It noted that Lim obtained funds to hire an investigator, but then never used that valuable resource. It reviewed Lim's minimal investigative efforts in locating and presenting two witnesses whose connections to Libberton were tenuous at best, App. A-43-45, discussed the contents of the presentence report, and identified the available evidence Lim could have discovered and presented if he had investigated. *Id.*

After identifying those facts, the court below turned to analyzing whether Libberton had been prejudiced by counsel's omissions. After describing the evidence presented by the two witnesses who testified at Libberton's abbreviated sentencing hearing, *id.*, pp. 46-47, the court addressed the contents of the presentence report and evaluations from Drs. Bindelglas and Dee. *Id.* The court detailed and discussed the "Evidence that Lim Could Have Discovered" had he looked. *Id.*, App. A-48-54. Its analysis and conclusion finding Libberton suffered prejudice by his counsel's multiple failures and inaction followed this Court's long line of decisions under similar facts. *See* App. A-43-46, 52-54, and discussion above.

Petitioner also argues the court below failed to consider the facts of the crime in reaching its decision. Cert. Pet., p. 27. It did consider those facts. It quoted the facts as "set forth in the Arizona Supreme Court's ruling on direct review" and detailed the investigation, including Norton's changing statements. App. A-4-18. Petitioner contends as well that the court below

failed to consider Arizona law in its prejudice analysis, and argues Arizona would "likely" afford "little mitigating weight" to "James' leadership role" in the crime, "Libberton's lesser role" and the "abusive childhood" Libberton suffered. Cert. Pet., p. 28. This Court has long held that evidence of abuse and neglect during a person's formative years constitutes potential mitigation that might influence the decisionmaker in supporting life. *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987); *Rompilla*, 545 U.S. at 393-393; *Williams*, 529 U.S. at 394.

Also, the analysis used to assess counsel's ineffectiveness is based on federal law, and does not change depending on any contrary law of a state court. *Strickland v Washington*, 466 U.S. 688 (1984). As discussed above, the evidence that counsel could have discovered had he investigated Libberton's background was powerful, relevant and the very kind of evidence that could have made a difference between life and death. *Williams*, 529 U.S. at 396 (despite history of criminal conduct, counsel ineffective where failed to introduce prior prison records showing good conduct, return call of CPA who visited defendant in jail, and present evidence of abusive childhood); *Rompilla*, 545 U.S. at 381-83 (although counsel interviewed family members, and retained three mental health experts, counsel ineffective where failed to examine school, juvenile and adult incarceration records). Finally, the decision of the court below provides Libberton only a fair sentencing trial that he was denied; it does not grant him relief from his conviction or ensure him a life sentence.

The facts here show, as the court below found, that "but for counsel's unprofessional errors," "there is a reasonable probability" the "result of the proceedings would have been different." *See Porter v McCollum*, 558 U.S, __, 130 S. Ct. 447, 452 (2009) (deficient performance found where counsel failed to subpoena school, medical, or military service records

or interview any members of the defendant's family, and as a result failed to learn of his abusive childhood, military service, substance abuse, and impaired mental health).

## IV. CONCLUSION.

The Ninth Circuit got it right. The unanimous panel properly applied this Court's jurisprudence to the unreasoned state court decision in finding that Libberton was prejudiced by his counsel's lack of effort at sentencing. Counsel's multiple errors and omissions in failing to conduct any reasonable investigation into the facts of the crime, Libberton's role in it, his background and identify key witnesses, records and evidence supporting a life sentence constituted ineffective assistance of counsel that prejudiced Libberton.

The decision granting Libberton a new sentencing hearing is supported by the facts and this Court's law. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.


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